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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 156.

No. 49, Miscellaneous.

MARGARET C. DONOVAN,

Petitioner,

—against—

QUEENSBORO CORPORATION, GARDEN HOUSING CORPORATION, THE TERMINAL HEIGHTS CORPORATION, QUEENSBORO INVESTING COMPANY, A. EDWARD MacDOUGALL, HENRY S. LOCKWOOD, A. EDWARD MacDOUGALL, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased,

Respondents.

PETITION OF THE PETITIONER FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE, OUT OF TIME, WITH MEMORANDUM OF LAW THEREON.

EDWARD F. CLARK,
Counsel for Petitioner,
60 Wall Street,
New York City (5), N. Y.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Respondents.

Motion of Petitioner for Leave to File, Out of Time, Petition for Rehearing.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now MARGARET C. DONOVAN, the petitioner in the above-entitled cause and moves, by Edward F. Clark, her counsel, that leave be granted to file out of time the attached petition for rehearing of her applications for certiorari herein, and in support thereof states:

1. That on October 11th, 1948, this Honorable Court denied her petition for writs of certiorari pursuant to Sec. 240-a of the Judicial Code (now covered by Sec. 1254(1) of the New Federal Judicial Code, (October Term, 1948, No. 156) and also denied her simultaneous petition pursuant to Sec. 262 of the Judicial Code (now covered by Sec. 1651(a) of said New Code) (October Term, 1948, No. 49, Miscellaneous).

2. That on or about September 22, 1948 (though not officially reported until November 22, 1948) a

conflict of decisions on the issue involved herein developed (as described in the annexed petition) between the decision of the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, and the decision herein of the United States Court of Appeals, Second Circuit. (Said *Cohen* decision was first officially published in Advance Sheet No. 1 of 170 F. 2d dated November 22, 1948.)

3. That this Honorable Court on February 28, 1949 granted a writ of certiorari to review the aforesaid decision of the United States Court of Appeals, Third Circuit.

4. That this petition for rehearing was not sooner presented because the aforesaid conflicting decision of the Third Circuit, as above stated, was not officially reported until November 22nd, 1948, a date subsequent to the time permitted by the Rules of this Court to petition herein for rehearing as of course, and neither petitioner nor her counsel were informed until very recently either of said decision or of the granting of writ of certiorari therein.

WHEREFORE, it is respectfully requested that leave to file, out of time, the annexed petition for rehearing be granted.

Respectfully submitted,

EDWARD F. CLARK,
Counsel for Petitioner.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. 156.

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Respondents.

Petition for Rehearing.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now MARGARET C. DONOVAN, the petitioner in the above-entitled cause, and presents, by her counsel Edward F. Clark, her petition for a rehearing of her petitions for a writ of certiorari herein and respectfully shows to this Honorable Court as follows:

1. On or about July 22nd, 1948 your petitioner filed her petition (No. 156, October Term, 1948) for a writ of certiorari pursuant to Sec. 240-a of the Judicial Code, and simultaneously moved for leave to file and did file a petition (No. 49, Miscellaneous, October Term, 1948) for a writ of certiorari pur-

suant to Sec. 262 of the Judicial Code, to the United States Circuit Court of Appeals, Second Circuit, together with brief in support of said petitions and the transcript of the record. Said Sec. 240-a is now covered by Sec. 1254(1) of the New Federal Judicial Code and said Sec. 262 by Sec. 1651 (a) of said New Code. For convenience said former numbers will be hereinafter used with reference to proceedings had before the New Code became effective.

2. That the questions presented and reasons relied on in said petitions may be summarized as follows, being more fully set forth in the petitions, brief and transcript of record filed with this court pursuant to the aforesaid sections of the Judicial Code.

SUMMARY OF QUESTIONS PRESENTED.

(a) Whether the federal District Court, where jurisdiction is based on diversity of citizenship, *must* give effect to Sec. 61-b and 64 of the General Corporation Law of New York requiring plaintiff, in a derivative stockholders action, under circumstances set forth in the statute, to give security for expenses, including counsel fees.

(b) Whether such a statute may in such court be given effect within the discretion of the District Court, and if so whether the District Court did not abuse its discretion in the instant case where the effect of its order requiring security would make it impossible for plaintiff to prosecute her suit.

(c) Whether the said statute, inherently and as applied in the present case, is not in violation of Sec. 1 of Amendment XIV of the United States Constitution.

(d) Whether the order requiring such security and the stay imposed thereby did not, under the circumstances shown in said petitions and record, constitute a final determination appealable under Sec. 128 of the Judicial Code (now covered by Sec. 1291 of the New Judicial Code) or an injunction appealable under Sec. 129 of the Judicial Code (now covered by Sec. 1292 (1) of said New Code).

Summary of Reasons.

(a) The important questions of federal law not previously decided, relating to

(1) The applicability in the federal courts of statutes requiring such security and their constitutionality.

(2) The finality and appealability of orders in the federal courts requiring such security pursuant to state statutes.

(3) The appealability of such orders, under former Judicial Code Sec. 129, as injunctions by reason of the stay imposed therein.

(b) The substantial public interest to be served by determination of the important questions involved, in view of the adoption of such state statutes in a considerable number of states and the diversity of application thereof in the various federal courts.

(c) The conflict between the New York Statutes (General Corporation Law, 61-b, 64) and similar statutes of other states, and the Federal Rules of Civil Procedure. (See Report of Advisory Committee on Rules for Civil Procedure 5 F. R. D. 433, 451.)

3. That on October 11th, 1948 this Court denied the aforesaid petitions for certiorari.

4. That on or about September 22nd, 1948, the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, considering a substantially identical statute of New Jersey, held an order of the New Jersey District Court appealable, which had denied the defendant's motion for security, and reversed such order. That such decision of the Third Circuit constitutes a conflict of decisions with the Second Circuit on the question of finality and appealability of orders relating to security under such state statutes, the Second Circuit having held the order for security in your petitioner's case to be non-appealable. The said conflict has arisen subsequent to the filing of your petitioner's aforesaid petitions for writ of certiorari and the said Third Circuit decision was first officially reported on November 22nd, 1948, in the Advance Sheet of 170 F. 2d of that date, subsequent to the denial of certiorari herein.

5. That this Court on February 28th, 1949 granted a writ of certiorari to review the aforesaid determination of the United States Court of Appeals, Third Circuit.

6. This application is made out of time and at this date because the decision of the Third Circuit was not officially reported until November 22nd, 1948, and did not come to the attention of petitioner or her counsel until very recently—subsequent to this Court's denial of her petition for writ of certiorari. Moreover, neither petitioner nor her counsel were informed of the granting of certiorari in the *Cohen* case (supra) until March 14th, 1949.

7. Your petitioner verily believes that granting of this petition for rehearing is desirable for the following reasons:

(a) A conflict having developed subsequent to this Court's denial of her petition, and certiorari having been granted in the *Cohen* case referred to above, the granting of certiorari herein will give this Court the benefit of examination and argument of the additional or contrary aspects of the two cases arising in different circuits.

(b) It will enable this Court to do justice to the parties.

(c) It will dispose of the *entire* question of finality and appealability of orders relating to security under state statutes. The Third Circuit has in the *Cohen* case held an order *denying* security appealable. The Second Circuit, in *Thompson* v. *Broadfoot*, 165 F. (2d) 744 (referred to in *Aspinook Corp.* v. *Bright*, 165 F. (2d) 294) dismissed an appeal from an order denying security. Similarly, the Second Circuit in the instant case, *Donovan* v. *Queensboro Corporation*, dismissed an

appeal from an order *granting* security holding such order to be non-appealable. Accordingly, the present circumstances afford this Court an unusual opportunity to effect clarification of the entire question and thus avoid the possible need of further review in a case similar to your petitioner's.

(d) The need for a settlement by this Court of any conflict between the New York Statutes (General Corporation Law, 61-b, 64) and similar statutes of other states, and the Federal Rules of Civil Procedure.

(e) The issues presented on the question of finality and appealability as set forth in your petitioner's papers are broader in scope, involving, as they do, not only the question of finality under Sec. 128 of the Judicial Code (now Sec. 1291 of the New Judicial Code), but also the question of appealability of decisions constituting, in substance and effect, injunctions within the meaning of Sec. 129 of the Judicial Code (now Sec. 1292 (1) of said New Code).

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals, Second Circuit, commanding said Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record of the proceedings of the said Circuit Court had in this case entitled on its docket, "Margaret C. Donovan, Plaintiff-Appellant against Queensboro Corpo-

ration, Garden Housing Corporation, The Terminal Heights Corporation, Queensboro Investing Company, A. Edward MacDougall, Henry S. Lockwood, A. Edward MacDougall, as Executor of the Last Will and Testament of Edward A. MacDougall, Deceased" (No. 21000); to the end that this cause may be reviewed both under the aforesaid Section 240-a now Sec. 1254 (1) and Section 262 now Sec. 1651 (a) of the Judicial Code and the rules of this Court and determined by this Court as provided for by the statutes of the United States; or, in the alternative, that this Court proceed under Sec. 262 of the Judicial Code (now Sec. 1651 (a) of the New Code), in accordance with petitioner's separate petition filed under the number 49 Miscellaneous, to review the entire question before the District Court in accordance with the practice followed by this Court in the case of *Matter of 620 Church Street Building Corp.,* 299 U. S. 24; and that the order herein of the said Circuit Court of Appeals refusing to hear the petitioner's appeal from the District Court be reversed by this Court; and that this Court reverse the order of the District Court from which the petitioner's appeal was sought to be taken; and for such further relief as to this Court may seem proper.

Dated: New York City, N. Y., March 30, 1949.

MARGARET C. DONOVAN,
Petitioner,
By EDWARD F. CLARK,
Counsel for Petitioner.

Certificate of Counsel.

I, Counsel for the above-named Margaret C. Donovan, petitioner and movant, do hereby certify that both the foregoing petition for rehearing of petitioner's application for writs of certiorari herein and the foregoing motion for leave to file, out of time, said petition for rehearing are presented in good faith, not for delay, and made upon grounds not previously urged due to circumstances which have arisen since the date of the original petitions, namely, (1) that since the filing of said original petitions on or about July 22nd, 1948 a conflict of decisions as to appealability has arisen between the United States Court of Appeals, Third Circuit, in *Cohen* v. *Beneficial Industrial Loan Corporation,* 170 F. 2d 44, and the decision of the United States Court of Appeals, Second Circuit, in this case, and (2) that since said conflict arose this Court has granted certiorari in said *Cohen* case; and, in the judgment of counsel, said grounds are well founded in law and in fact.

And I do further certify that said petition and motion for rehearing are restricted to the grounds above specified.

EDWARD F. CLARK,
Counsel for Margaret C. Donovan,
Petitioner and Movant.

March 30, 1949.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1948.

No. 156.

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Respondents.

MEMORANDUM OF LAW.

The Conflict of Decisions.

A. *Cohen* v. *Beneficial Industrial Loan Corporation, et al.*, 170 F. 2d 44 (U. S. C. A., 3rd Circuit), decided September 22, 1948 (first officially reported November 22, 1948), reversing order of U. S. District Court, New Jersey, reported at 7 F. R. D. 352; certiorari granted February 28, 1949.

This case, arising in the United States District Court, District of New Jersey, was a derivative stockholders suit, jurisdiction being based on diversity of citizenship.

Plaintiffs held approximately one hundredth of one per cent of the stock of defendant corporation, the

complaint alleging, at considerable length, mismanagement and fraud (170 F. 2d 44 at p. 47). The District Court denied a motion of the defendant corporation for an order requiring plaintiffs to give $125,000 security under the New Jersey Statute (2 N. J. R. S. Cum. Supp. 14:3-15), a statute substantially identical with Sec. 61-b of the New York General Corporation Law.

On appeal to the U. S. Court of Appeals, Third Circuit, that Court said (170 F. 2d 44 at p. 49):

> "Preliminarily we must determine whether the order of the Court below is appealable."

and again at page 49:

> "We are not unmindful of the provisions of R. S. 14:3-15 which state that the corporation 'at any stage of the proceeding' may make application for security but the court below deemed the statute inapplicable to the instant case at any time. It follows therefore that without the right to sustain an appeal Beneficial could never gain the security to which it is entitled if the statute is applicable for a writ of mandamus could issue from this court only in aid of its appellate jurisdiction. * * * We hold the order to be appealable."

B. ***The case at bar***—*Donovan* v. *Queensboro Corporation, et al.*, 75 F. Supp. 131 (opinion of District Court) (R. 4-9) appeal dismissed on motion (R. 23, 35); certiorari denied (October 11, 1948) 93 L. Ed. Adv. Op. 26.

This case also is (in part) a derivative stockholder's suit, instituted in the U. S. District Court,

E. D. N. Y., the basis of jurisdiction being diversity of citizenship.

The petitioner-plaintiff is the holder of voting trust certificates for 111½ shares of stock of defendant Garden Housing Corporation out of a total of 4730, or approximately 2.35%, having a par value of $11,150 and a claimed value of $39,000 (R. 22). The defendant Garden Housing Corporation was the owner and operator of an apartment development, and the defendant Queensboro Corporation owned or controlled directly or indirectly 87% of its stock. The primary relief sought by plaintiff is against the Queensboro Corporation as the wrongful recipient and beneficiary of assets of Garden Housing Corporation allegedly wasted, mismanaged and misappropriated, by the defendants through the domination and control exercised by defendant Queensboro (R. 24, 25). The inability of petitioner-plaintiff to acquire or enlist in her cause 5% of the total stock—the statutory requirement to avoid security—was called to the attention of the Court of Appeals (R. 25, 26).

The defendant corporation moved in the District Court for $50,000 security for expenses and counsel fees, pursuant to the New York statute, which was granted, the District Court finding such amount to be fair and reasonable; and all proceedings on plaintiff's part were stayed pending deposit of the security except for review, modification or vacation of the order (R. 11). The plaintiff showed by affidavit her inability to furnish other than the usual $250 security for costs and asked that the order provide for dismissal of the complaint within a fixed time upon failure to provide the security, so as to eliminate

any doubt as to finality. Such application was denied (R. 11, 12).

An appeal by plaintiff to the Circuit Court of Appeals, Second Circuit, was dismissed, on the ground the order of the District Court was non-appealable (R. 23), and plaintiff's petition for rehearing denied (R. 35).

Petitioner's petitions for writs of certiorari pursuant to Secs. 240-a and 262 of the Judicial Code were filed July 22, 1948 and denied by this Court on October 11th, 1948 (93 L. Ed. Advs. Op. 26).

Although the appeal to the Court of Appeals from the District Court did not bring up all of the papers which were before the District Court, the record as presented to the Court of Appeals and to this Court is completely adequate to raise all essential questions. Plaintiff's complaint, which was before the District Court, was handed up to the Court of Appeals, and in the petition for rehearing filed before the Court of Appeals, the essential allegations of the complaint and the facts pertinent to the issue of security under 61-b were fairly and adequately restated (R. 24-29).

Granting of Certiorari Herein Will Necessarily Bring About More Complete Argument and Examination of the Question in Conflict.

In *R. Simpson & Co. Inc.* v. *Comm.*, 321 U. S. 225 at 229, this Court states:

> "It sometimes is desirable in the light of events to grant a previously denied writ of certiorari, as where it appears the question must later be taken because of conflict. A grant in such a case not only enables us to do justice to the party if it appears that he has the right of the con-

troversy, but also it gives us the benefit of argument and examination of the additional or contrary aspects of the question presented by the case."

That there are additional and contrary aspects of the two cases in conflict is clear from reference to the varying facts in each case.

The petitioners in the *Cohen* case represent a microscopic fraction (1/100 of 1%) of the ownership of a large corporation ($90,000,000 in assets). The petitioner in the instant case is a relatively substantial holder (2.35%) of shares in a small corporation whose stock is closely held. She presents the situation of a share-partner in a small business enterprise who can have no recourse against an over-reaching majority interest under circumstances where the requisite 5% of capital stock cannot be acquired and the security requirement is so drastic as to deprive her of her "day in court".

Moreover in the instant case, although the action is necessarily derivative in part, the major relief is sought against another corporation, dominating and controlling Garden Housing Corporation, the business corporation of which plaintiff is a part owner. The defense of the action would therefore be sustained by such outside corporate defendant and not by the Garden Housing Corporation. The only justification or reason for the New York statutes, 61-b and 64 of the General Corporation Law, would, therefore, be inapplicable.

Failure to afford relief in such circumstances sets a precedent for denial of an effective remedy to any business man or investor in a small corporation who in many instances would be unable to acquire the necessary 5% interest because of the controlling inter-

est by the very persons of whose wrongdoing he may be complaining.

The Granting of the Petition Will Enable This Court to Do Justice to the Parties.

In addition to what has been said above, it is desired here to re-emphasize the fact that petitioner has—by the unreversed decisions of the District Court—been effectively denied access to the Court and the opportunity of ever having her case considered on the merits. This results from the impossibility of plaintiff complying with the "5% or $50,000 market value" provisions of the state statute and her sworn inability to post the $50,000 security as ordered (R. 27). The truth of such allegation is now further evidenced by the lapse of time during which she has been powerless to proceed with her case in the District Court.

The Granting of the Petition Will Result in a More Complete Disposition of the Question in Conflict.

In the *Cohen* case the Third Circuit held appealable an order *denying* security. In the instant case the Second Circuit held non-appealable an order *granting* security.

It is entirely possible that a determination by this Court in the *Cohen* case would not necessarily preclude the question presented in the instant case from again arising and ultimately requiring separate disposition by this Court.

The very manner in which the two cases came before the respective Circuits affords the possibility that subsequently subtle distinctions may be drawn by attorneys or judges in applying any decision of this Court reached on consideration of the *Cohen* case alone.

The wholly different background, as between the State of New Jersey and the State of New York, with respect to the time honored practice in New Jersey of requiring unsuccessful litigants to pay a counsel fee, should also receive attention in connection with the consideration of the constitutional question, particularly with respect to the question whether or not the statute in New York is not harsh and discriminatory. It has always been the practice in New Jersey Chancery that the unsuccessful litigant may be required—and usually was—to pay the counsel fees of the successful litigant in substantial amounts.

> *Rothenberg* v. *Franklin Washington Trust Co.*, 131 N. J. Eq. 463 (Headnote 2).

It has been expressly authorized by a New Jersey statute (N. J. S. A. 2:29-131).

In New York, on the other hand, all efforts to expand the burden upon the unsuccessful litigant beyond relatively minor costs, have been continuously resisted. There has been only one exception, and that seldom applied, namely, that in a *difficult and extraordinary case,* the unsuccessful litigant may be required to pay up to, but not more than $2000. That is the maximum sum permissible irrespective of the amount involved or the number of successful parties in the litigation (N. Y. Civ. Pr. Act. Secs. 1513, 1514).

> *Manko* v. *City of Buffalo,* 271 App. Div. 286, affd. 296 N. Y. 905;
> *Duncan* v. *Dewitt,* 7 Hun 184;
> *Fry* v. *N. Y. C. etc. R. R. Co.,* 114 App. Div. 623.

Accordingly, in view of the long established and consistent attitude of the New York courts and legislature limiting recovery of anything but restricted

statutory costs, it may seriously be doubted whether Sec. 61-b (adopted without legislative hearings, *New Aspects of Stockholders' Derivative Suits,* 47 Columbia Law Review, 1, 2) represents such an established policy of the State of New York that effect must be given to it in the federal courts.

The Instant Case Presents a More Definitive Question of Finality and Appealability.

A. Upon the question of finality, the order of the District Court in the instant case, requiring $50,000 security from a plaintiff unable to furnish anything but nominal security for costs, means the ending of that litigation without any possibility of the plaintiff being heard on appeal. In the *Cohen* case, on the contrary, the only damage that would have been suffered would be the possible loss of counsel fees to the successful litigant due to the fact that the unsuccessful litigant had become financially irresponsible.

B. The instant case presents directly for consideration of the Court the question of appealability of the order of the District Court under former Section 129, on the ground that the stay contained therein constitutes an injunction. Certainly, the order of the District Court has so far had the complete effect of an injunction, in view of the demonstrated inability of the plaintiff to proceed with her case.

Respectfully submitted,

EDWARD F. CLARK,
Counsel for Petitioner.

EDWARD F. CLARK,
LEONARD J. REYNOLDS,
JOHN A. SHORTEN,
Of Counsel.